

§2.48 REVOCATION, PRELIMINARY INTERVIEW.

(a) **Interviewing officer:** A parolee who is retaken on a warrant issued by a Commissioner shall be given a preliminary interview by an official designated by the Regional Commissioner to enable the Commission to determine if there is probable cause to believe that the parolee has violated his parole as charged, and if so, whether a revocation hearing should be conducted. The official designated to conduct the preliminary interview may be a U.S. Probation Officer in the district where the prisoner is confined, provided he is not the officer who recommended that the warrant be issued.

(b) **Notice and opportunity to postpone interview:** At the beginning of the preliminary interview, the interviewing officer shall ascertain that the Warrant Application has been given to the parolee as required by §2.46(b), and shall advise the parolee that he may have the preliminary interview postponed in order to obtain representation by an attorney or arrange for the attendance of witnesses. The parolee shall also be advised that if he cannot afford to retain an attorney he may apply to a U.S. District Court for appointment of counsel to represent him at the preliminary interview and the revocation hearing pursuant to 18 U.S.C. 3006A. In addition, the parolee may request the Commission to obtain the presence of persons who have given information upon which revocation may be based. Such adverse witnesses shall be requested to attend the preliminary interview unless the parolee admits a violation or has been convicted of a new offense while on supervision or unless the interviewing officer finds good cause for their non-attendance. Pursuant to §2.51 a subpoena may be issued for the appearance of adverse witnesses or the production of documents.

(c) **Review of the charges:** At the preliminary interview, the interviewing officer shall review the violation charges with the parolee, apprise the parolee of the evidence which has been presented to the Commission, receive the statements of witnesses and documentary evidence on behalf of the parolee, and allow cross-examination of those witnesses in attendance. Disclosure of the evidence presented to the Commission shall be made pursuant to §2.50(d).

(d) At the conclusion of the preliminary interview, the interviewing officer shall inform the parolee of his recommended decision as to whether there is probable cause to believe that the parolee has violated the conditions of his release, and shall submit to the Commission a digest of the interview together with his recommended decision.

(1) If the interviewing officer's recommended decision is that no probable cause may be found to believe that the parolee has violated the conditions of his release, the responsible Regional Commissioner shall review such recommended decision and notify the parolee of his final decision concerning probable cause as expeditiously as possible following receipt of the interviewing officer's digest. A decision to release the parolee shall be implemented without delay.

(2) If the interviewing officer's recommended decision is that probable cause may be found to believe that the parolee has violated a condition (or conditions) of his release, the responsible Regional Commissioner shall notify the parolee of his final decision concerning probable cause within 21 days of the date of the preliminary interview.

(3) Notice to the parolee of any final decision of a Regional Commissioner finding probable cause and ordering a revocation hearing shall state the charges upon which probable cause has been found and the evidence relied upon.

(e) **Release notwithstanding probable cause:** If the Commission finds probable cause to believe that the parolee has violated the conditions of his release, reinstatement to supervision or release pending further proceeding may nonetheless be ordered if it is determined that:

(1) Continuation of revocation proceedings is not warranted despite the violations found; or

(2) Incarceration pending further revocation proceedings is not warranted by the alleged frequency or seriousness of such violation or violations, and that the parolee is not likely to fail to appear for further proceedings, and that the parolee does not constitute a danger to himself or others.

(f) **Conviction as probable cause:** Conviction of a Federal, State, or Local crime committed subsequent to release by a parolee shall constitute probable cause for the purposes of this section and no preliminary interview shall be conducted unless otherwise ordered by the Regional Commissioner.

(g) **Local revocation hearing:** A postponed preliminary interview may be conducted as a local revocation hearing by a hearing examiner, hearing examiner panel, or other official designated by the Regional Commissioner provided that the parolee has been advised that the postponed preliminary interview will constitute his final revocation hearing.

Notes and Procedures

■ 2.48-01. Preliminary Interview.

(a) The preliminary interview is to be conducted (offered to the parolee) without unnecessary delay. Where the alleged violator is arrested outside of his district of supervision, the documents specified in warrant application are to be transmitted immediately to the probation officer designated to conduct the interview. The probation officer supervising the case or recommending the warrant may not conduct the preliminary interview.

(b) The releasee is to be advised of his right to be represented by counsel (retained or court-appointed) at a postponed preliminary interview and at the revocation hearing. Parole Forms F-2 and CJA-22 (addressing this issue) are to be given to the releasee. The releasee is to be advised of his right to have witnesses (including adverse witnesses) appear or be interviewed on his behalf at a postponed preliminary interview and at the revocation hearing.

(c) When the parolee contests the charges against him, it will be customary for the parolee's supervising probation officer to be available as a witness at a preliminary interview in the district of supervision, for questioning by either the interviewing officer or the parolee, unless there is good cause for non-appearance (e.g., distance or possibility of aggressive confrontation).

(d) Reporter or recording devices brought in by the alleged violator or his attorney/representative are not permissible. No reproduction of the interview will be permitted. The purpose of this prohibition is to preserve the informality of the preliminary interview, and to ensure that the attention of all parties at the final revocation hearing is focused upon the merits of the case and not the propriety of the probable cause decision. Once the final revocation hearing is commenced, the probable cause decision becomes a moot issue.

■ 2.48-02. Authorization of Continuance.

One continuance (postponement of a preliminary interview) may be granted by the interviewing officer for up to 30 days to permit the alleged violator to obtain counsel and/or witnesses. The continuance should be recorded in writing. Any further continuances, for cause, shall be approved by the Regional Commissioner. In cases where the alleged violator is detained by the court on a charge and where the violation warrant has been inadvertently executed, a decision will be made as to whether or not a local revocation will be held at the place of detention or when he is returned to a Federal institution. In such cases the

Commission's legal office should be contacted for advice.

■ 2.48-03. *The Probable Cause Finding.*

(a) The interviewing officer shall prepare and submit to the Regional Commissioner a summary of the interview which shall include recommended findings of whether there is probable cause to believe that a violation has occurred. A copy of the summary, minus the confidential section (see Appendix 3), is also given to the alleged violator (and his attorney if any) by the probation officer when he sends the original to the Commission. He shall make use of a checklist to guide him as he advises the alleged violator of his rights and the Commission's procedures. The probation officer's summary shall be in the format illustrated in Appendix 3. Accompanying it should be any statements prepared by the prisoner and other pertinent material submitted which has not previously been submitted to the Commission.

(b) Upon review of the summary of the preliminary interview, the Regional Commissioner shall either (1) order the prisoner reinstated to supervision; (2) direct that a revocation hearing be conducted in the locality of the charged violation(s) or place of arrest; or (3) direct that the prisoner be transferred to a Federal institution for a revocation hearing. In the absence of probable cause, the Regional Commissioner shall find "insufficient grounds for revocation based on the evidence presented" and reinstate the releasee to supervision, or close the case if his time would have expired had the warrant not been issued. *Every decision to release a parolee shall be implemented without delay.* The analyst shall send a telefax marked "urgent" to the U.S. Marshal (and the holding facility, if known) stating that the Regional Commissioner has ordered the parolee's release without delay; the U.S. Marshal shall be requested to confirm by return telefax or telephone call as soon as release is effected. The analyst shall verify by telephone that the order has been carried out or request immediate compliance, if a return telefax or call is not received within 24 hours of the order to release.

(c) The Regional Commissioner may also release the subject to the community pending a revocation hearing. In such case, the Commissioner should inform the Marshal in writing to release the subject pending further instructions. The warrant should be held in abeyance by the U.S. Probation Officer, but a summons should be issued to order the subject to appear at the revocation hearing. When, in such cases, the ultimate decision is to revoke, the Marshal should be instructed by telefax to again take the subject into custody pursuant to the original warrant. Such telefax must be from the Regional Commissioner to the U.S. Marshal, and must reflect an actual statement on an order signed by the Regional Commissioner that the U.S. Marshal is to reassume custody forthwith. If a letter directing the parolee's return to custody is sent in lieu of a telefax, it must be signed by the Regional Commissioner.

Situation 1: Appearance at a Preliminary Interview on the Basis of a Summons. After the Commissioner makes a finding that probable cause exists, he may schedule a revocation hearing and (a) issue a warrant to be forwarded to the U.S. Marshal with appropriate instructions (assume custody), or (b) issue a summons to be either mailed to the parolee (return receipt requested) or forwarded to the U.S. Marshal with instructions to serve it upon the parolee.

Situation 2: Appearance at a Preliminary Interview on the Basis of a Warrant. If the Commissioner finds probable cause after the Preliminary Interview, reinstatement to supervision or release pending further proceedings may be ordered pursuant to 28 C.F.R. 2.48(e). If release pending further proceedings is ordered, the Commissioner should inform the U.S. Marshal in writing (letter or telefax) to release the subject pending further instructions. The warrant will be held in abeyance at the U.S. Probation Office, but a summons should be issued to order the subject to appear at the revocation hearing. If no release pending further proceedings is ordered, subject remains in the custody of the U.S. Marshal on the basis of the warrant.

Situation 3: Appearance at a Local Revocation Hearing on the Basis of a Summons.

a. No Warrant issued previously. If parole is revoked and a continuance is ordered, the Commissioner may issue a warrant and forward it to the U.S. Marshal with instructions to assume custody. Or, the subject may be ordered to voluntarily surrender to the U.S. Marshal if it is deemed appropriate by the Regional Commissioner. In this instance, a certified letter, return receipt requested, with Notice of Action enclosed should be forwarded to the subject. Copies of this letter should be sent to the U.S. Marshal and U.S. Probation Officer (and attorney if necessary).

b. Warrant previously issued -- subject released pending local revocation hearing. If parole is revoked and a continuance is ordered, the Commissioner may instruct the U.S. Marshal, in writing (letter or telefax) to again take subject into custody by the further execution of the original warrant. Or, the subject may be ordered to voluntarily surrender to the U.S.

Marshal if it is deemed appropriate by the Regional Commissioner. In this instance a certified letter, return receipt requested, with a Notice of Action enclosed, should be forwarded to subject. Copies of this letter should be sent to the U.S. Marshal and U.S. Probation Officer (and attorney if necessary).

■ 2.48-04. *Notification of Results of Preliminary Interview.*

The parolee shall be promptly notified of the Regional Commissioner's decision. If probable cause is found, he shall be notified in writing of the charges upon which such finding was made and the evidence relied upon. (See Appendix 3). Copies of this letter should be sent to the U.S. Probation Office, the U.S. Marshal, and counsel for the parolee whether appointed or retained.

■ 2.48-05. *Preference for CCC Placement.*

In the case of administrative violations, a Community Corrections Center or similar placement is generally to be preferred to returning the parolee to prison.

■ 2.48-06. *Supplemental Warrant Application.*

(a)(1) When new violations are brought to the attention of the Regional Commissioner, it is the Commission's interpretation of 18 U.S.C. 4213 and 4214 that a supplemental warrant application may be issued at any time prior to the revocation hearing (whether the violations are discovered before or after the normal expiration of supervision), provided that (A) the warrant itself was issued within the normal expiration of supervision, and (B) the violations to be listed on the supplement occurred before the normal expiration of supervision. In the case of an absconder, violations that occurred after the normal expiration of supervision may be included on the supplemental warrant application (See paragraph (a)(2)(A) below). It is also the Commission's interpretation that, under 18 U.S.C. 4210(b)(2), a conviction for such a charge is a valid basis for forfeiture of street time.

Note: The above interpretation may not be applied to alleged violators in New York, Vermont, and Connecticut, given the Second Circuit's decision in Toomey v. Young, nor may it be applied to alleged violators in Kentucky, Michigan, Ohio, and Tennessee, given the Sixth Circuit's decision in Barrier v. Beaver. For these cases, the legal office should be consulted before a supplemental warrant application is issued after the normal expiration of supervision, unless the purpose of the supplemental application is simply to provide further information (e.g., notice of conviction) on a charge already listed on an application issued before the expiration date (see paragraph (a)(2)(B) below).

(2)(A) Violations of parole occurring after the normal expiration of supervision may be added to an outstanding warrant if the parolee is an absconder from supervision for whom a timely warrant has been issued. The supplemental warrant application should be issued as soon after the parolee's arrest as possible. If the absconding charge cannot be sustained at the revocation hearing, such supplemental charges may not be used to revoke parole or forfeit street time.

(B) Information which administratively updates a charge already listed on the warrant application (e.g., a conviction on a pending charge) may be listed on a supplemental warrant application at any time, even if the term of supervision has expired.

(b) If the new charges are received after the preliminary interview has been conducted, the prisoner and his attorney, if any, shall be informed by letter that such charges will be considered at the revocation hearing. If the hearing is a local revocation hearing, the letter will also state that the alleged violator may request adverse witnesses. A letter of notification should also be issued if new evidence received after the probable cause finding requires the reinstatement of charges upon which a finding of no probable cause was made. The reinstated charge and the new evidence should be described. Once probable cause has been found on one charge or set of charges, no further preliminary interview need be held on supplemental charges.

Exception: Occasionally a supplemental charge refers to a violation sufficiently serious as to significantly increase the severity of the overall charges and therefore likely expose the releasee to more time in custody if found to have committed the violation. In such case, when the prisoner is scheduled for an institutional revocation hearing with no new conviction or conviction(s) for relatively minor offense(s), the interests of justice normally indicate that the Commission provide the prisoner the opportunity to request a local revocation hearing.

(c) Additional charges which come to light during the preliminary interview may be used, and a supplemental warrant application should be issued if time permits.

■ 2.48-07. *Recommended Finding of No Probable Cause.*

If the interviewing officer finds no probable cause to believe a violation has occurred, he shall contact the Commission immediately for instructions. A new preliminary interview should be held in any case where defects, vagueness, or omissions in the warrant application can be corrected by a supplemental warrant application.

■ 2.48-08. *No Preliminary Interview Where There Is A Conviction.*

(a) As the conviction of an offense committed while under supervision constitutes "probable cause" that at least one condition of parole or mandatory release was violated, no preliminary interview is required in such cases. For any serious criminal offense, therefore, a preliminary interview will not be conducted where there is definite information of a conviction. The probation officer should obtain documentary verification of any conviction and transmit it to the Commission. The designation request should not be delayed, however, unless there is reasonable doubt as to the authenticity of the information that a conviction has occurred.

(b) The Regional Commissioner shall require a preliminary interview in marginal cases, for example: (1) where there was a conviction for a minor offense and there is a strong possibility that the releasee will be reinstated to supervision; or (2) where other administrative charges clearly constitute the more serious violations; or (3) where the conviction is for an infraction (such as a minor traffic violation, loitering, or disorderly conduct) and a fine (rather than imprisonment) is the usual disposition.

(c) Where a forfeiture of collateral constitutes a conviction, in the majority of cases it will fall within the marginal cases described above, and the preliminary interview must be held. Decisions to defer prosecution, suspend acceptance of a guilty plea, or to enter a conviction which by its own terms is "not final" (under certain state statutes), are not "convictions" and do not remove the need for a preliminary interview or provide a basis for denial of local revocation hearing (see 2.48-09).

(d) At the time of issuing a violator warrant where a conviction is used as a basis for such warrant, the United States Marshal shall be instructed by use of Form H-24 (with a copy to the probation officer) to furnish a copy of the warrant application to the prisoner (and the probation officer for information purposes only) and, where no preliminary interview is being held, to transfer the prisoner to a federal institution immediately upon receipt of a designation order from the Bureau of Prisons. In such cases, the Parole Commission will request designation by the Bureau of Prisons without delay. Prior to designation and transfer, the parolee should be advised in writing by letter (1) that probable cause for violation was established by his new conviction, (2) of the charges to be considered at his institutional revocation hearing, and (3) that he will be transferred to a federal institution for his revocation hearing.

(e) In cases where a conviction is not used as a basis for a warrant but the Commission is advised of a conviction following such issuance, the Commission may advise the probation officer to refrain from holding the preliminary interview which would normally be conducted in the absence of any such conviction. Coincident with such information, a supplemental warrant application should be issued for delivery to the prisoner alleging the offense for which the releasee was convicted.

■ 2.48-09. *"Non-Final", Indian Tribal Court, and Foreign Convictions.*

(a) Circumstances may arise in which it becomes difficult to determine when a court disposition of criminal charges brought against a parolee or mandatory releasee constitutes a "conviction" of federal, state, or local law. It is essential to be certain that the subject has really sustained a conviction before taking actions regarding forfeiture of street time, denial of a preliminary interview, or denial of a local revocation hearing. Cases in which there is room for doubt as to whether the disposition is a conviction should be referred to the legal counsel's office for advice prior to entering a decision.

(b) For purposes of forfeiture of street time, denial of a preliminary interview, or denial of a local revocation hearing, do not count the following convictions:

(1) "Non-Final" Convictions. A decision to defer prosecution, suspend acceptance of a guilty plea, or enter a conviction which by its own terms is not final is included in this heading. [These dispositions result from a procedure deliberately designed to shield the defendant from adverse consequences of a formal conviction.] For example, some state traffic courts will expressly make convictions "non-final" in order to avoid the effect of a state law that requires a person's driving license be revoked if "convicted" of certain traffic offenses. Such convictions only become "final" if the defendant subsequently violates probation. Diversionary programs that involve a guilty plea or finding but no formal conviction also come under this heading (for example,

“adjudication withheld” under Florida law).

(2) Foreign Convictions.

(3) Indian Tribal Court Convictions.

(c) For purposes of evidence in Revocation Proceedings:

(1) The following may be treated as conclusive evidence of law violation:

(i) "Non-Final" convictions of federal, state, or local laws [when the parolee entered a guilty plea or a plea of nolo contendere, or when a court finding of guilt was entered].

(ii) Indian Tribal convictions [when it is determined that the parolee had counsel or that counsel was waived].

(iii) Foreign Convictions. Note: A rare exception to the Commission's ability to rely upon foreign convictions as conclusive would be when the parolee provides evidence that the conviction was obtained by blatantly improper means (fraud, duress, etc.) or that the conduct committed is not recognizable as a criminal violation under U.S. domestic law.

(2) Indian Tribal Convictions [where there is no positive showing of counsel or waiver of counsel] should be handled as are allegations of U.S. law violation where there is no conviction. That is, the underlying evidence and testimony may be relied upon in order to make an independent finding of a law violation.

■ 2.48-09. *Refusal by Parolee to Participate in Preliminary Interview.*

If a parolee refuses to participate in a preliminary interview, or refuses to complete the form requesting witnesses or a local revocation hearing, and there has been no new conviction, the parolee shall be deemed to have waived his opportunity to request a local revocation hearing, and the case shall be processed for an institutional revocation hearing.